No. 20939

IN THE

United States Court of Appeals

1966 Term

WESTERN CONSTRUCTORS, INC.,
a corporation,
Counterclaimant-Appellant,
vs.
SOUTHERN PACIFIC COMPANY,
a corporation,
Counterdefendant-Appellee.

WESTERN CONSTRUCTORS, INC.,
a corporation,
Defendant-Appellant,
vs.
SOUTHERN PACIFIC COMPANY,
a corporation,
Plaintiff-Appellee.

Appeal from the United States District Court for the District of Arizona

REPLY BRIEF OF COUNTERCLAIMANT-APPELLANT AND DEFENDANT-APPELLANT WESTERN CONSTRUCTORS, INC.

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THE APPELLEE'S STATEMENT OF THE CASE

Rule 18 of this Court provides in part:

"His (appellee's) brief shall be of like character with that required of the appellant, except that no specifications of error shall be required, and no statement of the case unless that presented by the appellant is controverted."

Appellee has not pointed to any factual statement in Appellant's Opening Brief which is challenged.

Instead of taking issue with the factual picture presented by Appellant thereby bringing into focus disputed areas in the evidence and the reasonable inferences therefrom, with appropriate record references, Appellee has presented a watered down and abbreviated statement of the case without either challenging or agreeing with Appellant's Statement.

In order that Appellant may not likewise seem unwilling to fairly meet facts or inferences stated by Appellee, Appellant will isolate the few material facts stated by Appellee as facts which are thought by Appellant to be either inaccurately or unfairly stated and deal with them.

Our main criticism of Appellee's Statement of the Case, other than its avoidance of any specification of error in Appellant's Fact Statement, is its failure to accurately report or give consideration to large segments of Appellant's evidence which Appellee simply ignores. Even a hungry man may turn quickly from a dish found quite unpalatable. Could it be that perhaps Appellee has turned quickly away from a consideration of all of Appellant's evidence for the reason it has little stomach for many of the facts in evidence?

APPELLEE'S POINT A: APPELLEE SPEAKS OF THE PRIVATE CROSSING AS "PURELY AN ACCOMMODATION" (BRIEF OF APPELLEE, HEREINAFTER B.A.) AND ALSO STATES "OTHER PHYSICAL MEANS" WERE AVAILABLE BY WHICH THE DIRT FILL COULD BE TRANSPORTED OVER THE TRACKS — I.E., BY AN OVERPASS TO THE WEST (B.A. 2).

This argument of Appellee does not present a matter of great significance. However, Appellee implies Appellant was in some fashion advantaged by use of this private roadway. In fact, the arrangement was one between the State of Arizona and Appellant

(R.T. 98, Deft's Ex. V in Evid.). The State of Arizona simply told the bidding contractors, including Appellant, by its "Memo to Contractors" (Deft's Ex. V in Evid.) that this was the crossing to be used and they were to be "guided accordingly." We assume Southern Pacific had good and sufficient reasons for authorizing the crossing, but certainly all Appellant or other bidders would have done had use of the overpass been required would have been to increase the contract bid price accordingly.

In this connection, Appellee points to the various mechanical safeguards of which it says "these were the precautions taken by the railroad to guard against accidents" (B.A. 3). Appellee then states (B.A. 12): "Furthermore, we take the position that because of such precautions and right of way preserved by the Agreement the railroad company had a right to operate its trains *by remote control if it so desired, without any lookout.*" (Emphasis supplied).

It would appear from the record that this was the position taken and in fact acted upon by engineer Henderson, although he refused to be quite as forthright and candid in his testimony about his attitude toward any persons who might be upon the tracks of railroad as are counsel for Appellee in Appellee's Brief.

The query naturally suggests itself: "What precautions did the railroad company take to prevent injury to others?" By rough calculation, a simple reduction by one-third in railroad's usual speed through this area for one mile approaching the crossing would only delay the overall elapsed time of the train from Gila Bend to Tucson by less than one minute. This was an ordinary freight train hauling ordinary freight. An examination of the speed tape (Deft's Ex. V in Evid.) discloses that the train was easily maneuverable as to slowing down and speeding up, contrary to Appellee's boldly stated claims.

APPELLEE'S POINT B: THE RED HEADLIGHT AND THE EMERGENCY APPLICATION OF THE BRAKES ARE ASSERTED BY APPELLEE TO HAVE OCCURRED WHEN

THE TRAIN WAS ONE-HALF MILE FROM THE PRIVATE CROSSING.

Appellee fixes the point when the headlight of the train engine turned red, or the red headlight was turned on, as if it were a clearly settled fact. Such is not the case.

Both Kness, the carryall driver, and Avila, the crossing watchman, admitted that they were very excited as they pushed the carryall in the face of the oncoming train; ran to see if it was clear of the track; pushed again; and then raced for safety, (R.T. 189, 237) so much so that accurate observation was not possible (R.T. 239). Indeed every experienced trial judge and lawyer would know this would be the fact.

Kness variously stated as to where the train was when he saw the headlight was red in color: "it might have been" (R.T. 186, 187), "it was possible" (R.T. 187), he "couldn't say for sure" (R.T. 189), so that against his background of impending great danger accurate observation manifestly was impossible and his statements were less than an educated guess.

Appellee then argues: "The significance of the red headlight on the train is this * * When the train brakes are put in emergency this light turns red automatically." (B.A. 5). Appellee then flatly states (B.A. 7): "The significance of the red headlight seen by Avila and Kness (Western's own employees and witnesses) when the train was half a mile away proves that the brakes were on * * ." Appellee then says (B.A. 7): "* * * the only permissible inference raised by the speed tape is that during approximately the first half mile of brake application the train's inertia was not yet overcome and its speed not much affected." [1]

When we recall the engineer Henderson testified that when in an emergency application of the brakes "each and every brake on

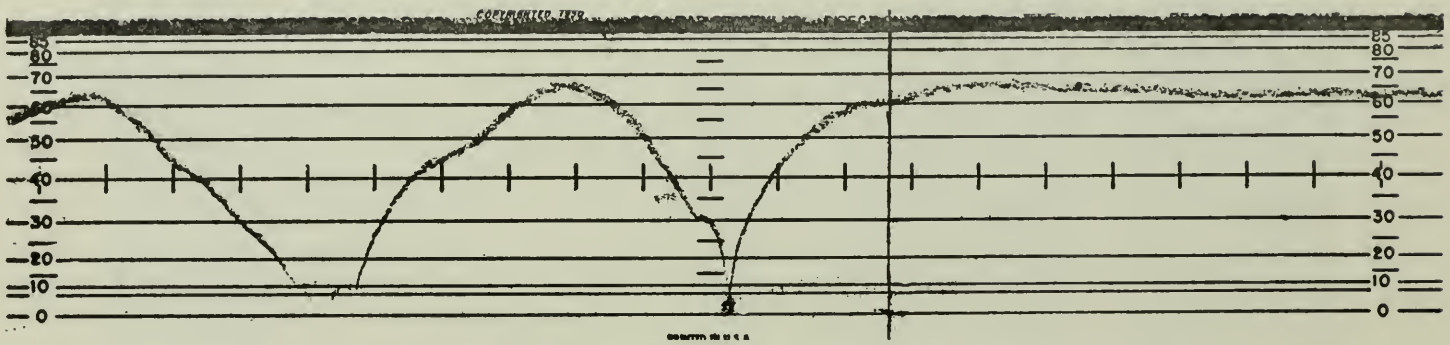
[1]The thought comes to mind that the mere operation of a train of this size with brakes so inadequate in and of itself could well be found to constitute wanton negligence. *Womack v. Preach,* 63 Ariz. 390, 163 P.2d 280).

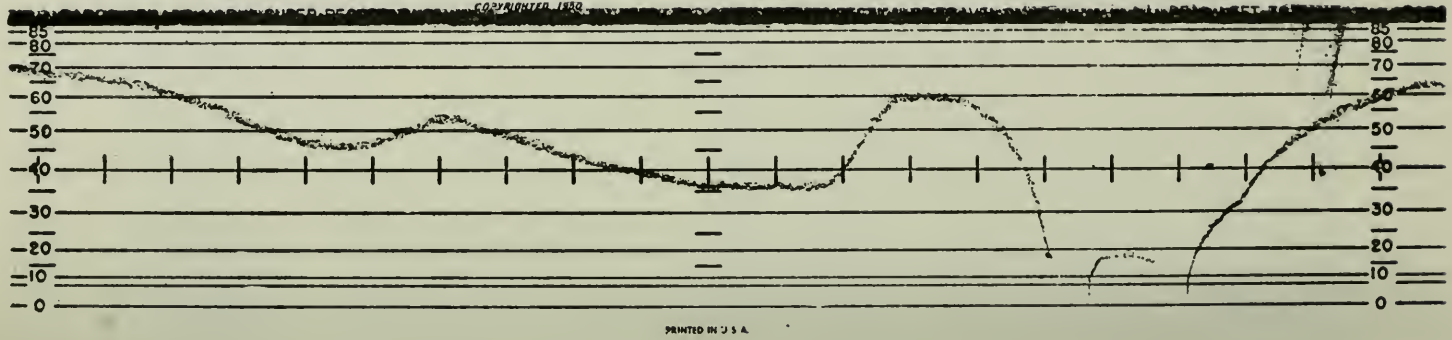
the entire train from the head of the engine to the caboose" is locked against its brake drum so tight that "many times" the wheels are "actually sliding" (R.T. 352, 353), we wonder if Appellee really expects this statement of fact and argument to be taken seriously. If Appellee does, it tosses no bouquets to Court or counsel for intellectual attainments or any knowledge of elementary principles or physics.

Indeed an examination of this same speed tape (Deft's Ex. V in Evid.) discloses that in non-emergency situations and therefore less drastic brake applications, for some strange and unexplained reason the brakes apparently work much better. For the convenience of the Court we reproduce here two excerpts from this speed tape showing the train movements prior to approaching the accident scene which demonstrates the complete lack of substance to this contention.[2]

[2] Appellant does not suggest that these two excerpts are true samples of the train movements for they are selected as emphasizing normal stopping and starting up train operation when a non-emergency stop is indicated.

(The speed tape As shown on page 6 should be read held horizontally. The printer's requirements dictate that it be reproduced in vertitcal position.)


85
80
70
60
50
40
30
20
10
0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APPELLANT'S POINT C: THE TESTIMONY OF THE TRAIN PERSONNEL.

Appellee attempts to smooth out the mountains and canyons in the testimony of Henderson and the fireman, Brothers, as to where the train was with reference to the crossing and the carryall at various times by a table (B.A. 6) which is incomplete and but partially accurate. However, the most serious defects in the testimony of the train personnel which occurs in their testimony is as to what *in fact they saw actually happening and when they saw it happen.*

Confusion as to where a witness was, distance wise, from a given point when an event occurs can be explained, in part at least, upon the basis that human recollection as related to time and distance can be and often is inaccurate. But no such charitable explanation is available to gloss over the positive statement that a witness saw something which in fact was not there and which did not in fact occur.

The temptation is great to repeat again the seriously incriminating evidence reviewed in Appellant's Opening Brief (20-27) from which the conclusion reasonably follows that Henderson and Brothers were in fact not keeping a lookout ahead even though they knew the crossing ahead was dangerous to the life and property of others. We believe the matter was adequately covered in Appellant's Opening Brief and hence do not pursue it further here. We merely observe that if Kness in fact jumped off the carryall and was attempting to keep it rolling when the train was in excess of a mile away, then the testimony of Henderson and Brothers is simply either a figment of their imagination or a deliberately contrived story to cover up their failure to keep a lookout ahead.

APPELLEE'S POINT D: APPELLEE'S ARGUMENT RELATING TO WANTON NEGLIGENCE (B.A. 11, 12, 13).

Appellee asks:

"Moreover, why shouldn't engineer Henderson have con-

tinued to operate his trains at 60-65 miles per hour, as was customary and allowable? He had duly reported his observation and concern to the Company, and in turn registered some complaint with Western. Why should he be required to assume that careless driving would take place at the crossing on the day of the accident?"

We should not have been surprised to have read such a question posed by railroad counsel if written around the turn of the century; today it is a little shocking.

But since the question is posed perforce Appellant will answer it:

The reason Mr. Henderson should not have continued to operate the train upon the assumption that no "careless driving would take place at the crossing" was because he knew it was a crossing at which he expected "someone might get hurt" (R.T. 333, 334). It just might happen that one of his fellow men might be in the path of his train, carelessly or otherwise, and therefore Mr. Henderson should consider his obligation and that of his employer to exercise that care which one normal human being should have for another who might be in peril.

Appellee (B.A. 3) recounts, almost with an air of pride, the various precautions which it took to avoid harm to its trains. It has no place, however, in the record to point to, with or without pride, where it recounts the steps it took to avoid injuring others.

Appellee then queries if Appellant would quarrel as to whether the brakes should have been applied three-quarters of a mile away instead of one-half mile away, as Appellee assumes to have been the fact. Appellant's quarrel is not with whether or not the brakes should have been applied one-half or three-quarters of a mile away; Appellant's quarrel is with the plain fact the brakes were not applied at all—or at least in practical effect insofar as stopping or slowing the train is concerned, they were not applied at all.

Finally, Appellee argues that there was no reason to expect

a carryall would stall on the tractks—none had ever stalled there before. Appellee would hide and direct attention from the jugular vein of its liability for wanton negligence. We are not here dealing with what might happen. We are here concerned with what did happen, with the *fact* that the carryall *was so stalled in plain sight* of the engineer while the train was over one mile away and on a crossing *at which the engineer knew* there was a hazard to others.

We are here concerned with the fact that the engineer either did not see the stalled vehicle upon this crossing where he was on notice vehicles and persons might be involved, or if he saw it, he simply decided to "let the chips (and railroad cars, carryalls and bodies) fall where they may."

The balance of the miscellaneous arguments made by Appellee are bottomed upon selected witness statements, out of context with the evidence and the entire case, and hence are not meaningful or helpful when viewed in the light of the complete factual picture as developed from all the evidence in the case.

APPELLEE'S DISCUSSION OF THE ARIZONA WANTON NEGLIGENCE CASES

Appellee considers the Arizona wanton negligence railroad cases and pretty much brushes them off upon the basis that each of two cases, *Southern Pacific v. Barnes* (Arizona Court of Civil Appeals, Div. 2, June 17, 1966) and *Alires v. Southern Pacific,* 93 Ariz. 97, 378 P.2d 913, are distinguishable in that principally heavily travelled crossings were involved in each case.

In so contending, Appellee argues without giving thought to the reasons for the Arizona Court's emphasis upon this fact in each case. The only purpose served by the proof in each case was to show that the railroad and its operating personnel were upon notice that someone might be injured at the crossing in question.

Here we need not, although it is available, rely upon this type of circumstantial evidence to show the engineer should have been

alert to danger at the crossing. We have his own sworn admission that he knew of the hazard and in fact expected that someone "might get hurt at the crossing." This case, if anything, because of this, is a stronger case for a finding of wanton negligence than either *Alires* or *Barnes.*

The *Bryan* case (79 Ariz. 253, 286 P.2d 781) is also brushed off with the reasoning that, again the case involved a crossing at which danger could be anticipated and also a flying switch of a freight car "without brakes and out of control." The danger was known and real at Picacho and, while the train had brakes and an engineer's hand at the throttle, the engineer who had the responsibility for exercising control over the train was quite insensible to his responsibilities. Control not exercised and brakes unused do not add up to freedom from wanton negligence—quite the contrary.

We note in Appellee's discussion of Arizona cases an entire absence of any reference to the Arizona case of *Southern Pacific v. Bolen,* 76 Ariz. 317, 264 P.2d 401, considered at pages 13-14 of Appellant's Opening Brief, in which the Arizona Supreme Court aligns itself with the majority of the courts in the United States in holding a railroad to a humanitarian standard of care even as to anticipated trespassers. Why this oversight is unexplained. It may be that while counsel for Appellee was preparing to deal with this particular phase of Appellant's Opening Brief the title to an old song was running through his mind.[3]

APPELLEE'S ARGUMENT THAT THE COLLISION WAS "CAUSED BY" OR "AROSE OUT OF" (ETC.) USE OF THE ROADWAY (B.A. 13-19).

Appellee first argues that in some fashion the indemnity agreement is enlarged or bolstered by a wholly independent contract clause of the Private Roadway Agreement, which clause is to the effect that Western Construction should not obstruct or interfere with the passage of railroad's trains. Quite the contrary

[3] "Absence Makes the Heart Grow Fonder."

result is reached if the clause is examined against the entire agreement. This provision would have been entirely superfluous if railroad had considered that the indemnity agreement here sued upon was as broad and all inclusive as railroad now contends.

Appellee next attaches significance to the contract provision requiring that Appellant procure not less than $250,000 property damage insurance, which reference Appellee justifies as being for the stated purpose of showing that Western was assuming broad responsibilities to railroad for damage occurring at this crossing.

Again, quite the contrary conclusion follows. Certainly had Western been fairly advised that it was to become, in fact, an insurer of the safety of railroad's trains passing over this roadway, even though the loss was in no fashion the fault of Western and was the sole result of railroad's negligence (over which Western would have no control), far higher limits of insurance would have been sought by Western. It is, we hazard the guess, doubtful if any solvent and knowledgeable insurance company would have written such a risk at a premium Western could afford to pay. The very size of the railroad's claim in this case ($750,000) reasonably points to the conclusion that neither railroad nor Western contemplated any such broad liability exposure as railroad now asserts Western assumed.

Appellee relies upon seven insurance cases as authority for the meaning it would attach to "caused by" or "arising out of." Appellant was unable to persuade the District Judge that cases interpreting the coverage afforded by a policy of insurance written by an insurance company in the business of insuring risks and for which it has received a premium are of no value in interpreting language of an indemnity agreement written by the indemnitee and imposing an indemnity liability for the negligence of the indemnitee upon a non-compensated indemnitor—indeed in this case, a "captive" indemnitor.

We are however, not disheartened, and again assert, with confidence, that such cases as these (*Schmidt v. Utilities Insurance Co.*,

182 S.W.2d 181, 181, 154 A.L.R. 1088; *Manufacturers Casualty Insurance Company v. Goodville Mutual Casualty Co.,* 170 A.2d 571; *Merchants Co. v. Hartford Accident & Indemnity Co.,* 188 So. 571; *Eastern Trans. Co. v. Liberty Mutual Casualty Co.,* 144 A2.d 911; *Avery v. American Automobile Insurance Co.,* 166 S.W.2d 471; *Red Ball Motor Frieght v. Employers Mutual Liability Insurance Co.,* 189 F.2d 374; and *American Automobile Insurance Co. v. Master Bldg. Supply & Lbr. Co.,* 179 F.Supp. 699 (B.A. 14, 15, 16)) are not, as Appellee apparently convinced the District Judge, of any value as precedents in a case such as this. Each deals with the coverage afforded by a policy written by an insurance company and for which it was paid a premium. We will not, therefore, take the time to analyze or treat them further.

Appellee rules out railroad language in considering the meaning of these terms, "arising out of" and "caused by" B.A. 17), upon the ground that Appellee was not here acting as a common carrier. Appellee in so doing shoots wide of the mark. The argument was that since a common carrier—a railroad—wrote the agreement, it was appropriate to look to railroad language to see what the railroad at least had in mind. Such seems in keeping with usual rules of contract construction.

Appellee mainly relies upon *Southern Pacific v. Morrison-Knudson Co.,* 338 P.2d 665 (Ore.) However, other than reaching a conclusion palatable to Appellee, the case is not otherwise helpful. There the indemnitor was directly advantaged by the agreement for a bunker; it sought the agreement and it received a definite advantage from it. Secondly, the indemnity agreement was direct and clear so that the indemnitor was on notice of its obligation. Thirdly, the injury was the result of the joint negligence of the railroad and Morrison-Knudson; and finally the bunker installation, the subject of the indemnity agreement, was so constructed that it was partly over and partly under the railroad spur track, and the injury resulted from inadequate clearance of the part of the bunker over the spur track from which the parties to the agreement considered damage might result.

Hartford Fire Insurance Company v. Chicago, M. & St. P. Ry. Co., 175 U.S. 91, 44 L.Ed. 84, is authority solely for the proposition that a railroad indemnity contract involving its non-common carrier activities is not contrary to public policy, and *Rhinehart v. Southern Pacific Company,* 38 F.Supp. 76, repeats the oft stated rule that a railroad in leasing property adjoining its railroad can excuse itself from fire loss due to sparks. No one disputes this.

APPELLEE'S ANSWER TO THE BURDEN OF PROOF SPECIFICATION OF ERROR (Op. Br. 36, et seq.)

Appellant can find no real basis for attempting a reply to Appellee's treatment in its Brief of this point which Appellant considered quite persuasively supported by *Guerrero v. American-Hawaiian Steamship Compay,* 222 F.2d 238, which this Court decided in 1955, as cited and quoted in Appellant's Opening Brief (36, 37, 38).

In effect, Appellee says that Appellant is wrong and relies upon the assertion as authority for the statement.

This we have understood is known as the rule in the "ipse dixit" case, but we had never understood it was very persuasive authority at a judicial level above that of Justice of the Peace courts.

We will answer Appellee's argument in the same fashion Appellee answered this point in our Opening Brief.

Appellee is wrong and Appellant is right.

THE ASSERTION OF APPELLEE THAT THE LANGUAGE OF PARAGRAPH 6 OF THE PRIVATE ROADWAY AGREEMENT IS "CRYSTAL CLEAR" (Op. Br. 38, 39, 40, 41)

Appellee disposes of this entire problem with the observation (Appellee's Brief 38): "In our opinion the sentence (which comprises the entire Paragraph 6 of the Roadway Agreement cannot even be improved upon."

Thus, with one backward sweep of the hand Appellee brushes

aside the horde of cases holding that a non-compensated surety is favored by the law and that an indemnity agreement collateral to a main contract by which a non-compensated surety is claimed to indemnify another against such others own negligence will not be construed to have that reach unless the intent to do so is clear and unequivocal.

In *Atterbury v. Carpenter,* 321 F.2d 921 (1963) this court said:

> "Atterbury was not merely a surety; he was a voluntary surety, not a compensated surety engaged in the business of executing surety contracts for an actuarially-computed premium. See Restatement, Security, supra, Sec. 82, Comment i. As such he is favored by the law, see Union Oil Company of California, supra, (349 P.2d 243 (Ore.)) and can raise discharge defenses on the basis of strictissimi juris which are not available to compensated sureties."

The courts, when dealing with the claim that a non-compensated surety is obligated to save an indemnitee harmless from the consequences of its own negligence, variously state the test to be applied and met before this conclusion will be reached. All courts seem to require that it be clear the indemnitor intended to and realized the burden which the indemnity agreement placed upon him and that the indemnitee, if the author of the agreement, has clearly stated the obligation to be assumed by the indemnitor. The test is variously stated as "clear and unequivocal"; "there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation"; "must be clearly and unequivocally expressed"; "unless such obligation is expressed in unequivocal terms"; "must be made apparent by clear, precise and unequivocal language."

143 A.L.R. 312, Par. III, p. 315.

175 A.L.R. 8 (sole negligence of indemnitee, p. 32).

Halliburton Oil Well etc. v. Paulk, 180 F.2d 79, C.A. 5 (1950).

Southern Bell Tel. & Tel. v. Mayor, 74 F.2d 983, C.A. 5 (1935).

Brown v. Moore, 247 F.2d 711, C.A. 3 (1957). *Cert. den.* 78 S.Ct. 148

Camden Safe Deposit etc. Co. v. Eavenson (Pa.), 145 A. 434.

Turner Const. v. W. J. Halloran etc. Co., 240 F.2d 441, C.A. 1 (1957).

Ambrose v. Standard Oil Co., 214 F.Supp. 872 (1963) (Judge Kilkenny)

Boise Cascade Corp. v. Nicholson Mfg. Co., 221 F.Supp. 135 (Judge Salomon).

Southern Pacific Co. v. Layman, 173 Ore. 277, 145 P.2d 295, (1944) (Almost directly in point).

Perry v. Payne (Pa.), 66 A. 553, 11 L.R.A. (N.S.) 1173.

Thompson-Starrett Co. v. Otis Elevator Co., 2 N.E.2d 35, Court of Appeals N.Y. (1935).

Basin Oil Company v. Baash-Ross Tool Co., 271 P.2d 122 (1954) (Cal. Ct. Appeals).

Pacific Indemnity Co. v. California etc. Ltd., 84 P.2d 313, 320 (1938) (Cal. Ct. Appeals).

Smith v. Ohio Oil Co., 356 S.W.2d 443 (1962). (Tex. Ct. App.).

Westinghouse Elec. Co. v. LaSalle Corp., (1946). (Sup.Ct.Ill.) 70 N.E.2d 604.

Williston on Contracts (Revised Ed.), Vol. 6, Sec. 1825 n.8.

We believe that the indemnity agreement here relied upon by railroad to excuse its own sole negligence is unclear and the obligation imposed upon the licensee obscured and buried under a flood of words and phrases to where its full impact is not appreciated or understood by an expert in sentence analysis even after careful study. Careful study of this paragraph (Par. 6) does not justify any conclusion that Western's obligation, as contended

for by railroad, is clearly and unequivocably spelled out. Even after careful analysis the true meaning of this long and involved sentence (Par. 6) remains uncertain and unclear.

We need not pause to ascertain if this lack of preciseness and clarity is studied or whether, like Topsy, the sentence "just grew." The fact is that it is uncertain and unclear and that railroad either made it so in order to secure ready acceptance of the clause by prospectitve indemnitors or simply permitted this imprecise phraseology to grow into and become part of the agreement. The legal result is the same in either case.

We hesitate to believe that this contract has not been reviewed from time to time by competent counsel. We are reluctant to conclude that, in fact, such review by learned counsel would lead to the conclusion that as a matter of sentence structure, the sentence would bear no improvement.

It may be that counsel means, in concluding that the sentence structure of the paragraph cannot be improved upon, that for the purpose of railroad and to the end that the onerous burden which railroad now claims it imposes upon a licensee continues to be carefully obscured to trap the unwary, the sentence cannot be improved upon.

We hope not.

CONCLUSION

Appellant, Western Constructors, Inc., respectfully urges that the judgment below should be reversed and with directions to dismiss the Complaint of Railroad, or, in any event, that Appellant be awarded a new trial as to both railroad's Complaint and Appellant's Counterclaim.

Respectfully submitted,
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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
Attorney